§ 6-326. General provisions governing discovery.

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance Agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial Preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his or her attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his or her case and that he or she is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written

statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivisions (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result,

(i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and

(ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the district court in the district where the deposition is to be taken, may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to

certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his or her response with respect to any question directly addressed to

(A) the identity and location of persons having knowledge of discoverable matters, and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

(2) A party is under a duty seasonably to amend a prior response if he or she obtains information upon the basis of which

(A) he or she knows that the response was incorrect when made, or

(B) he or she knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court or by agreement of the parties.

(f) Service of Discovery Papers. Except as otherwise ordered by the court, every discovery paper and every motion relating to discovery and response thereto required to be served upon a party shall be served upon each of the parties not in default for failure to appear.

(g) Filing of Discovery Materials. Discovery materials that do not require action by the court shall not be filed with the court. All such materials, including notices of deposition, depositions, certificates of filing a deposition, interrogatories, answers and objections to interrogatories,

requests for documents or to permit entry upon land and responses or objections to such requests, requests for admissions and responses or objections to such requests, subpoenas for depositions or other discovery and returns of service of subpoenas, and related notices shall be maintained by the parties.

Discovery materials shall be filed with the court only when ordered by the court or when required by law. If the original of a deposition is not in the possession of a party who intends to offer it in evidence at a hearing, that party may give notice to the party in possession of it that the deposition will be needed at the hearing. Upon receiving such notice the party in possession of the deposition shall either make it available to the party who intends to offer it or produce it at the hearing.

COMMENTS TO RULE 26

26(a) This subsection provides a catalog of the discovery devices, and is new to Nebraska law. Although there is no limit on the frequency of use of these methods, the limit on interrogatory questions in Rule 33 will restrict the extent of discovery by interrogatory.

26(b)(1) and (2) The definition of the scope of discovery in subsection (1) follows former Neb. Rev. Stat. § 25-1267.02 (Repealed 1982). The provision of subsection (2) was taken from the federal rules and follows the rule established in *Walls v. Horback*, 189 Neb. 479, 203 N.W.2d 490 (1973).

26(b)(3) Subsection (3) provides for protection of material often described as an attorney's work product, and follows the language of the federal rule. Prior Nebraska law on discovery of work product was established in *Haarhues v. Gordon*, 180 Neb. 189, 141 N.W.2d 856 (1966). A provision similar but not identical to the second paragraph of subsection (3) was found in Neb. Rev. Stat. § 25-1222.02 (Repealed 1982). That section, however, applied only to statements by parties and provided only the sanction of exclusion at trial. The language found in subsection (3) was adopted to maintain uniformity of language, to authorize a wider range of sanctions, and to cover statements by parties and nonparties.

26(b)(4) Subsection (4) on experts presents in the expanded language of the federal rules the idea found in former Neb. Rev. Stat. § 27-705(2) (Repealed 1982). The committee recommended repeal of that section, a part of the Nebraska Evidence Rules, because it is a discovery procedure better codified here in the discovery rules.

26(c) This provision on sanctions is substantially similar to former Neb. Rev. Stat. §§ 25-1267.22 and 25-267.31 (Repealed 1982), but is expanded to include all kinds of discovery and not just depositions and interrogatories.

26(d) This is a new provision identical to the federal rules; it would not appear to change current Nebraska practice.

26(e) This provision on supplementation of discovery was added to the federal rules in 1970 and is now adopted for the first time in Nebraska. The proposed language follows the federal rule, except that in subsection (e)(3) the federal language allowing imposition of the duty to supplement by a request for supplementation was rejected.

26(f) A provision on service of discovery papers is necessary because Nebraska law prior to

the adoption of these rules did not cover the topic. This is a nonuniform addition to the language of the federal rules because such a provision is in Rule 5(a) of the federal rules, while Nebraska has no similar rule.

26(g) This rule has been adopted because the routine filing of discovery material has unnecessarily overcrowded court files. Parties are now required to keep possession of the discovery material and file it only upon court order or when required by law. Discovery materials used to support or resist a motion for summary judgment shall not be filed separately; Neb. Rev. Stat. § 25-1332 (Amended 2001) makes clear that the court may consider them only if they are admitted as evidence.

Rule 26(g) amended December 12, 2001; Comments to Rule 26(g) amended December 12, 2001. Renumbered and codified as § 6-326, effective July 18, 2008.